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In The Supreme Court of The United States

OCTOBER TERM, 1942

No. 97

ANSEL HIGGINS

vs.

CARR BROTHERS COMPANY, Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MAINE

BRIEF FOR RESPONDENT

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In The Supreme Court of The United States

Docket No. 97 **October Term, A. D. 1942**

ANSEL HIGGINS, Petitioner,

vs.

CARR BROTHERS COMPANY, INC., Respondent

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

BRIEF FOR CARR BROTHERS COMPANY, RESPONDENT

NARRATION

Ansel Higgins, Petitioner, was a night man and shipper (pp. 1, 7, Transcript of Record) in the employ of Carr Brothers Company, Respondent, from October 24, 1938, to April 1, 1939 (p. 1). He was driver of a truck for the Defendant, locally and entirely in the State of Maine from April 1, 1939, to July 24, 1940 (p. 1). He never drove a truck across a state line, nor did he ship anything out of the State of Maine save for the period from October 24, 1938, to January 1, 1939 (pp. 1, 7 and 8). He never delivered merchandise to a carrier for out of state shipment, unloaded from a carrier or hauled from a terminal to a warehouse.

The work of the Petitioner from January 1, 1939, to July 24, 1940, is the subject matter of the present controversy (pp. 2 and 7).

Carr Brothers Company is a Maine Corporation with its only place of business in Portland (p. 6). During the period in dispute, it shipped no goods out of Maine, sold no goods out of Maine and sold no goods to be carried out of Maine (pp. 1, 2, 6, 8).

The Respondent did not engage in brokerage (pp. 1, 6). It has always purchased its goods, warehoused them and owned them before it has sold them or taken orders for sale (p. 6). It has never ordered goods from out of the State of Maine to be shipped directly to the consumer (p. 6). It has never taken orders prior to purchase by it of the merchandise (p.6). It has acquired no goods from out of the state to be halted temporarily at the warehouse and then forwarded to customers outside the State of Maine (p. 6).

Some of Respondent's merchandise was bought by it from local producers and some was bought by it from dealers in other states (pp. 1 and 6). The business was fruit, grocery and produce (pp. 1 and 6). Some of the produce and fruit was processed by the Respondent (pp. 1 and 6). Much of it was sold in the condition in which it was received (p. 6).

ARGUMENT

The issue in the instant case is whether or not the Respondent from January 1, 1939, to July 24, 1940, was an industry engaged in commerce or in the production of goods for commerce.

For the period from October 24, 1938, to January 1, 1939, the trial Judge has found that the Respondent sustained a sale and delivery of goods from Portland to Berlin, New Hampshire, and that consequently the Respondent was engaged in interstate commerce. The Respondent has no quarrel with that finding, and even if it had such, it is now too late to question it. *Frank* v. *Mallett*, 92 Maine, 79.

From January 1, 1939, to July 24, 1940, the Respondent (pp. 2 and 6) sold no goods to purchasers outside of Maine, or which ultimately went out of Maine as far as the record discloses. During the time from January 1, 1939, to July, 1940, the Petitioner was a night man and shipper, and latterly, local truck driver, making local deliveries. There is no evidence that his work took him from a terminal to a warehouse. He was engaged in local distribution (pp. 2 and 7).

The issue paraphrased is this: Is a wholesaler who does a purely intrastate wholesale business, within the purview of the Fair Labor Standards Act if he acquires a considerable portion of his merchandise for sale from out of the State?

Were the court to decide in the affirmative, the control of the Federal Government over business that is purely local would be complete. Were this remote aftermath of interstate commerce to be considered within the jurisdiction of the national government, it would be extremely difficult to say how far the Federal Government can regulate local business. The interpretative bulletins of the administrators of the Fair Labor Standards Act are a patent attempt at a far reaching enlargement of government control, and if successful will be emphatically subversive of our conceived notions as to local, state autonomy.

The Respondent, if engaged in interstate commerce, was only such in a contemplation of the source of its merchandise and not the distribution of it. Until decided cases of the United States Supreme Court have been entirely discredited, the Respondent was, therefore, engaged purely in intrastate commerce. The interstate commerce terminated at the warehouse of the Respondent.

The Respondent performed no services as broker. It never sold what it did not own and already have in its warehouse. It negotiated no sales directly from the manufacturer or shipper to its own customers. It did not, therefore, promote the stream of commerce. Half of its volume was bought from local producers and sold locally.

While it is true that some of the merchandise was sold in the original packages, nevertheless, the stream of commerce had ended and the original package doctrine under the decisions cannot prevail. *Brown* v. *Bailey*, the decision of the Supreme Court of Tennessee hereinafter cited, is on all fours with the instant case with reference to the original package doctrine.

The bulwark of defense in this case and in similar cases will be the now famous Schechter case of the United States Supreme Court, which still stands in full force and vigor. Until that case has been completely discredited, the Plaintiff cannot successfully prosecute the issue here. The Schechter case is a stubborn fact.

LAW

The Fair Labor Standards Act of 1938

Title 29, U. S. C. A. in section 202 defines industries covered as follows:

"industries engaged in commerce — in the production of goods for commerce."

Commerce is defined in section 203

"(b) 'Commerce' means trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof."

(All of the Defendant's merchandise was purchased locally or finally landed from interstate shipment at a dead end street, to wit, Carr Brothers, Inc. warehouse.)

Schechter v. U. S., 295 U. S. 495

@ 520 "The defendants are slaughterhouse operators of the latter class '(marketmen)'. A. L. A. Schechter Poultry Corporation and Schechter Live Poultry Market are corporations conducting wholesale poultry slaughterhouse markets in Brooklyn, New York City. Joseph Schechter operated the

latter corporation and also guaranteed the credits of the former corporation, which was operated by Martin, Alex and Aaron Schechter. Defendants ordinarily purchase their live poultry from commission men at the West Washington Market in New York City or at the terminals serving the city, but occasionally they purchase from commission men in Philadelphia. They buy the poultry for slaughter and resale. After the poultry is trucked to their slaughterhouse markets in Brooklyn, it is resold, usually within twenty-four hours, to retail poultry dealers and butchers who sell directly to consumers. The poultry purchased from defendants is immediately slaughtered, prior to delivery by schochtim in defendant's employ. Defendants do not sell poultry in interstate commerce."

@ 542 "Were these transactions 'in' interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other states. But the code provisions, as here applied, do not concern the transportation of the poultry from other states to New York, or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees to defendants. When defendants had made their purchases, whether at West Washington Market in New York City or at the railroad terminals serving the city, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers, who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce."—

"The indisputed facts thus afford no warrant for the argument that the poultry handled by the defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow con-

tinues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use. So far as the poultry herein questioned is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the state. It was not held, used or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states. Hence decisions which deal with a stream of intery state commerce—where goods come to rest within a state temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here."—

@ 545—"But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to Federal control."—

Jones v. *McLaughlin*, 301 U. S. 1.

This was a case decided under the National Labor Relations Act and held that the Federal Government enjoys the power to regulate the relation as such of employer and employee in production or manufacture in order to protect interstate commerce although the source of the danger to interstate commerce be remote. There were four dissents to the majority opinion which reversed a Circuit Court decision. The court, however, conserved the distinction between intrastate and interstate commerce in these words:

> "The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which

> the commerce clause itself establishes, between commerce 'among the several states' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system.'

Jones vs. *McLaughlin* may be readily distinguished from the case at bar by two essential differences. In that case the Court found the veritable existence of interstate commerce. In the instant case, interstate commerce ended with the arrival of Respondent's merchandise at the local warehouse. In that case the National Labor Relations Act was under interpretation, 29 U. S. C. A., Sec. 151 ff.

The National Labor Relations Act contains the term or element "affecting commerce" and defines it as follows:

> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstruction commerce or the free flow of commerce."

The Fair Labor Standards Act follows the pattern of the Labor Relations Act but is abruptly halted to apply only to employees "engaged in commerce or in the production of goods for commerce." It does not control relations "affecting commerce." Indeed the legislative history of the Fair Labor Standards Act reveals that the House by amendment broadened the coverage to include "employer engaged in commerce in an industry affecting commerce" (H. Rep. No. 2182, 75th Cong., 3d Sess., p. 283, Cong. Rec. 7749 ff) but that in the conference committee the Senate refused to accept the House amendment and the conference draft of the bill enacted into law restored the norm of coverage contained in the original Senate bill (H. Rep. No. 2738, 75 Cong., 3d Sess, p. 29 ff; 83 Cong. Rec. 9158, 9266, 9267).

Senator Pepper of the Conference Committee in discussing the bill before the Senate and in reply to an objection to the broad scope of the act, said:

"I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce or the production of goods for interstate commerce, and the contrary theory was definitely rejected by the Committee."

So much for the old law, the mischief and the remedy. The "stream of commerce" theory is precluded in the instant case. Assuming that contrary to the Schechter case Congress could legislate as to the relation of the Petitioner with the Respondent under the facts of the case at bar, Congress did not include the present situation in the letter or intent of the Fair Labor Standards Act.

Jewel Tea Co. v. *Williams*, 118 Fed (2d) 202.

"The act by its terms is limited to employees engaged in interstate commerce for the production of goods for interstate commerce. It does not extend to employment that merely affects interstate commerce. If there could be doubt as to the correctness of this interpretation it is set at rest by the legislative history of the act. —Where goods are ordered and shipped in interstate commerce to meet the anticipated demands of customers without a specific order therefor from a customer and the goods come to rest in a warehouse the interstate commerce ceases when the goods come to rest in a state. It does not continue until the demand eventuates in the form of an order and the merchandise is delivered to the retailer. The mere fact that an anticipated local transaction causes a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce."

Even in cases, unlike the present case, where interstate commerce exists or will later be and has not ended as here "a close and substantial relation to interstate commerce" is required to justify control.

Santa Cruz Fruit Packing Co. v. *National Labor Relations Board*, 303 U. S., 453.

The Federal Wages and Hours Act

Harvard Law Review, Vol. 52, Page 646, @ Page 652. "Where a wholesaler or distributor ships goods outside the state, it seems apparent that he is 'engaged in commerce.' But only those of his employees occupied in loading or trucking are clearly so engaged. As to the others the problem is similar to that of 'back shop' railroad employees. Where the wholesaler or distributor imports goods for local distribution, the nature of the intermediate stoppage becomes important. If the goods are shipped to him, warehoused, and subsequently sold from the warehouse, it seems quite clear that, under existing authorities, the interstate movement has ended and that he is engaged in a purely local activity. Only those employees engaged in the actual unloading process are engaged in commerce, and even as to them a prolonged delay renders the Act unapplicable. If the goods are so resold that the continuity of the shipment is not broken, however, resort may be had to the 'flow of commerce cases'."—

Attention of the court is invited to the voluminous and learned footnotes 53 through 58 accompanying the above text and especially note 55 which declares that *Schechter* vs. United States cited supra is very much in point in the instant case although the Administrator of the Wage and Hour Division under the Fair Labor Standards Act "appears to minimize if not to ignore the apparent continued validity of this case."

Brown v. *Bailey,* 147 Southwestern 2nd 105, decided February 3, 1941, also cited Commerce Clearing House, paragraph 60256. In this case defendant employer was a wholesale liquor distributor in Tennessee with a warehouse and business in the City of Chattanooga. It sold whiskey which had come from outside the state, to dealers in Tennessee, partly in broken packages and partly in the original package. The plaintiff employee was the night watchman at the warehouse. The defense was that the liquor came to rest at

the warehouse in Chattanooga and thereafter was in intrastate commerce.

The court held that in spite of the sale in part of the product in the original containers, interstate commerce stopped in the warehouse of the defendant. A point was made of the fact that the defendant did no brokerage and therefore took no part in the stream of commerce.

Atlantic Coast Line Railroad Co. vs. *Standard Oil Co.*, 275 U. S. 257. Oil was brought by boat from Louisiana and Mexico to the plaintiff company in Florida. It was pumped to the tanks at Florida of the plaintiff. The plaintiff distributed and sold the oil in Florida. The United States Supreme Court held that this was intrastate commerce.

Laurence Baggett vs. *Henry Fischer Packing Company*, United States District Court, Western District of Kentucky, February 24, 1941, Commerce Clearing House, paragraph 60298.

The court held on motion that for an employee to come within the provisions of the Fair Labor Standards Act, he must allege and prove that he was engaged in commerce or in the production of goods for commerce; that it was not enough that the employer was.

Abadie vs. *Cudahy Packing Co. of La.*, United States District Court of La., Commerce Clearing House, paragraph 60314.

As a local truck driver, the work of the Plaintiff was so remote as in no event to be part of the stream or commerce.

Rivera vs. *Central Augirre Sugar Co.*, U. S. District Court, Porto Rico, April 21, 1941.

Fleming, Administrator vs. *McGehee*, U. S. District Court, Fla., July 23, 1941, Commerce Clearing House, 60614.

The last case says, "That it is the business that the employee is engaged in rather than the business of the employer that determines whether the employee is under the Act or

not." The same case holds that sales outside the state that are few and inconsequential compared to the Defendants' volume are of no effect. That the merchant must make substantial sales in interstate commerce to come within the Act.

See also:

Swift & Co. vs. *Welkerson,* Circuit Court of Appeals, 5th District, December 10, 1941, Commerce Clearing House, 60818.

Moses vs. *McKesson & Robbins, Inc.,* District Court, Southern District, Texas, February 20, 1942, Commerce Clearing House, 60952.

Hooks vs. *Nashville Breeko Block Tile Co.,* U. S. District Court, Tenn., July 7, 1941, Commerce Clearing House, 60620.

The case next above held that a company engaged in the manufacture and sale of cinder blocks for building is not engaged in interstate commerce within the meaning of the Act, where 98½% of its sales are intrastate.

Gerdert, et als. vs. *Certified Poultry & Egg Co., et al.,* U. S. District Court, Fla., April 29, 1941, Commerce Clearing House, 60479.

This case found that a wholesaler who purchased goods from outside the state and to whom the goods were delivered in interstate commerce by interstate transportation, who took the goods shipped from the interstate carrier and placed them in his store or warehouse, and who later sold them locally, was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act. The court further held that isolated transactions in interstate commerce, not a part of the usual course of business, do not bring a wholesaler within the provisions of the Act. The decision said that such would be true even if the Act undertook to regulate such transactions as being a practice that injuriously affected interstate commerce or the free flow of goods in commerce.

Fleming, Administrator vs. *Belo Corp.*, U. S. Circuit Court of Appeals, 5th Circuit, June 27, 1941, Commerce Clearing House, 60569.

This case held that the interpretative bulletins of the Administrator are not binding or necessarily persuasive upon the courts.

H. W. Lamb vs. *Quality Bakery Co.*, Tenn. Court of Appeals, August 10, 1941, Commerce Clearing House, 60084.

In this case plaintiff was a baker. 99% of the product were sold in the state. 1% was shipped outside the state. Approximately four shipments of some 50 to 100 lbs. each were made weekly to places, two or three in number, in other states. The court held that the interstate shipments were too inconsequential to make the provisions of the Act applicable. The Department bulletin of the Administrator was discredited because of the lack of any court decision.

Capital has been made by the plaintiff of the case of *Fleming, Administrator* vs. *Alterman Brothers*, U. S. District Court for the Northern District of Georgia, March 31, 1941, Commerce Clearing House, 60389, 38 Fed. Supp., 94 (page 25, footnote; Petitioner's Brief). I am informed that in the Alterman Brothers case the learned Judge completely adopted the brief of the Wage and Hour Division. The case ignores the Schechter decision and other authorities collected in the *Harvard Law Review*, reference cited above. In spite of the broad dicta in the opinion, there are several facts which essentially distinguish the Alterman Brothers case from the instant case. In the Alterman case, 99½% of the goods sold by the employer originated outside of Georgia. A great deal of the merchandise was packed in Indiana and in California and labeled "Packed for Alterman Brothers." All of the merchandise was bought by and sold to the Alterman Brothers outside of the State of Georgia, where title passed. Practically all of the merchandise sold in Georgia was sold in original packages. Almost all orders were for future de-

livery. Goods were ordered to meet anticipated future deliveries, and the tempo of buying and selling was accelerated so much that the Judge found a pretext for visualizing a stream of commerce. Goods were kept on hand only to meet constantly recurring orders. Very frequently orders were taken prior to a purchase by the employer to fill the orders. Such never happened in the instant case. Much of the Alterman Brothers business was obtained through bids and long term contracts specifying the size and kind of the product. Many were drop shipments, were made directly from the manufacturer to Alterman Brothers' customers. Such was pure brokerage, a practice in which Carr Brothers never participated. The Judge observes that some of Alterman Brothers' goods never stopped in their warehouse.

> *Ranhoff, et al.* vs. *Gramling & Co.*, District Court, Eastern District of Arkansas, August 22, 1941, Commerce Clearing House, PP 60822.

The foregoing case is quite identical with the instant case save for ½ of 1% of drop shipments ignored by the Court as inconsequential and not, of course, existing as an element in the case at bar.

The Ranhoff case has an added value to our present controversy. The learned District Court Judge in his excellent opinion with consummate finality distinguishes away *Binderup* vs. *Pathe Exchange, Inc.*, *Grand Union Tea Co.* vs. *Evans*, and other authorities cited in the brief of the Petitioner herein as authorities.

As we go to press the last decision of first instance under The Fair Labor Standards Act is:

> *Kirschbaum* vs. *Walling*, U. S. Supreme Court Law ed. Advance Opinions, Vol. 86, Page 1054.

The Court there extends the Act to some operating and maintenance employees of a loft building whose tenants produce goods principally for interstate commerce.

In the Kirschbaum case there was a "conceded production of goods for commerce by the tenants." In the instant case all interstate commerce had ended before the Petitioner rendered any services to the Respondent.

In the Kirschbaum case the employees did not participate "in the physical process of the making of the goods," but they were found to be engaged in a process or occupation necessary to that production, sec. 3 (j) of Act. The Petitioner in the case at bar was a local shipping clerk and local delivery truckster, who performed his labors after the goods had ended their interstate travels at Respondent's warehouse.

The Kirschbaum case excludes employees with "tenuous" relations to interstate commerce and the production of goods for it. Coverage by the act is found to be a matter of degree. But the Kirschbaum case does not affect employees after the fact of interstate commerce has ended, such as the Petitioner here.

General Tobacco & Grocery Co. vs. *Fleming*, 125 Fed (2nd) 596, C. C. A., 6th Circuit, Feb. 5, 1942.

The Administrator petitioned the District Court for an order requiring the appearance of witnesses and the production of evidence before the Administrator under The Fair Labor Standards Act. The employer responded to the show cause order objecting to the jurisdiction of the court on the ground that the employer was not engaged in interstate commerce. The employer's answer revealed a business identical with that of this Respondent save that the employer in that case bought more than one-half of his merchandise from outside its state. No evidence was taken out.

The Circuit Court reversed the order of the District Court granting the Administrator's petition because the record did not disclose interstate commerce.

Walling, Admr. vs. *Mutual Wholesale Food & Supply Co.*, U. S. Dist. Court, Minnesota, 4th Div., Commerce Clearing House, paragraph 61228.

That case ruled that a wholesaler buying almost all of his

goods from without the state and selling them within the state is not in interstate commerce under this Act, that in view of the wording of the Act the "stream of commerce" argument can not prevail.

Jax Beer Co. vs. *Redfern*, C. C. A., 5th Circuit, Texas, Dec. 10, 1941, Commerce Clearing House, paragraph 60817.

This was a case of a wholesale beer dealer which received all its product from out of state into its warehouse and sold it to intrastate retailers. The wholesaler was adjudged to be outside the Act.

Although, as we have stated supra, administrative bulletins under this Act have no binding effect upon the courts, it is interesting to note that the Wage and Hour Division in a statement of coverage under Section 12 (a) of The Fair Labor Standards Act, Field Instructions, dated June 4, 1942, has said:

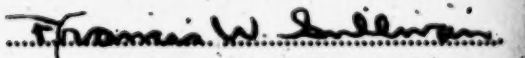
"Wholesale establishments and warehouses distributing all of their goods within the State. It is believed doubtful that a shipment or delivery for shipment in commerce takes place within the meaning of section 12 (a) of the Act where a wholesale establishment or warehouse neither ships goods directly across State lines nor delivers goods for shipment across State lines. Deliveries of goods from establishments of this type which employ minors should not be considered a violation of Section 12 (a)." Commerce Clearing House, PP. 33159.

REBUTTAL

The Transcript of Record in this case consists of opinions by the Superior and Supreme Courts below. Petitioner in his brief has made certain assertions and assumptions. Paragraphs 2, 4 and 5 of Page 4, Petitioner's Brief, are not sustained by the Transcript of Record. In the first sentence of paragraph 1, Page 11, "regularly recurring orders" are as-

serted without foundation in the record. Drop shipments in the last paragraph of Page 13 are gratuitously assumed. In the second sentence of the paragraph marked "Conclusion" on page 35, Petitioner's Brief, the accusation of failure to keep records required by the Act has no foundation in the Transcript of Record.

Respectfully submitted,



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